This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 8/12/02.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
THOMAS E. JACKSON,	)	
	)	**CHARGE: 1999CF0619**
	)	
Complainant,	)	**EEOC: 21B983435**
	)	**ALS NO: 11325**
	)	
and	)	
COLLEGE OF LAKE COUNTY-DISTRICT NO. 532,	)	

Respondent.

RECOMMENDED ORDER AND DECISION

This matter comes on to be heard pursuant to Respondent's, College of Lake County – District No. 532's (College) Motion for Summary Decision. Complainant, Thomas E. Jackson filed a Response and College filed a Reply. This matter is ready for decision.

Statement of the Case

On May 19, 1999, Complainant filed a charge of discrimination with the Illinois Department of Human Rights (Department). In that charge, Jackson alleged, *inter alia*, that he was racially harassed. On July 14, 2000, the Department filed a complaint on Jackson's behalf, alleging that Respondent racially harassed Complainant, in violation of Section 2-102A of the Illinois Human Rights Act.

Contentions of the Parties

Respondent states that Jackson cannot establish a claim of racial harassment. College contends that Jackson's harassment claim is predicated upon two events. First, that Jackson was followed by his supervisors in order to "check up" on his campus patrolling, and second, that Jackson's supervisor confronted him in the College of Lake County lounge for taking an unauthorized smoking break. Respondent argues that this conduct, even if true, does not establish a racially hostile and abusive environment; two incidents do not establish racial harassment, and neither of the two incidents contain racial overtones.

Next, Respondent argues that Jackson has not shown that he incurred an adverse employment action. For these reasons, College contends that Complainant cannot establish a *prima facie* case of racial harassment, so its Motion for Summary Decision must be granted.

Next, Respondent asserts that Complainant's supervisors had legitimate, non-discriminatory reasons for their actions, therefore even if Jackson could establish a *prima facie* case, College's actions were not discriminatory. College states that Complainant's supervisor followed him -- on one occasion only -- in order to ensure that Jackson was in compliance with College of Lake County rules and warnings that he had previously received regarding socializing while on duty. Further, Complainant was confronted while taking a smoking break because he had not followed College rules regarding notification that he was taking a break. Respondent argues that its actions clearly were not based upon Jackson's race. Therefore, its Motion for Summary Decision should be granted.

In his Response, Complainant states that he disputes each and every fact contained in the "Relevant Facts" section of Respondent's Motion for Summary Decision[1]. Since there are questions of material fact, Complainant argues that granting College's Summary Decision Motion would be improper.

Further, Jackson states that he suffered an adverse job action because he was not considered for other positions at Respondent. Also, Jackson states that he was treated differently than other white security officers, in that the white officers were not followed by their supervisors during their shifts, and were not "belittled" and accused of taking unauthorized breaks. Also, Jackson states that there is a question of material fact as to whether he was performing satisfactorily.

Findings of Fact

1. Thomas E. Jackson is an African American male.

2. He began working for the College of Lake County on February 21, 1996.

3. Jackson was employed as a Campus Safety Officer.

4. Kevin Lowry was Complainant's supervisor, his title was Director of Campus Safety.

5. In March, 1998, in a written evaluation of Jackson, Lowry stated that Jackson needed to address his excessive socializing and "hanging out" in public areas of the College of Lake County while on duty.

6. Lowry counseled Jackson on several occasions regarding his excessive socializing while on duty.

7. On August 6, 1998, Lowry and Dean Yost, Director of Facilities and Campus Safety at the College of Lake County, met with Complainant and counseled him regarding his failure to perform his duties because of his excessive socializing.

[1] While Complainant indicates that he **will** sign an affidavit denying these allegations, no affidavit is attached to his Response, and no affidavit has been filed to date.

8. On August 17, 1998, guidelines were developed regarding the proper procedures to be followed when Campus Safety Officers wished to take breaks. These guidelines were discussed with Complainant. These guidelines, *inter alia*, required Campus Safety Officers to call in and request approval for taking breaks.

9. On September 1, 1998, Yost and Lowry observed and monitored Jackson while Jackson was on duty. They observed Jackson socializing with another College employee while in his patrol car. This was the only occasion on which Lowry and Yost followed Jackson while on duty. This was done due to their concerns regarding Jackson's job performance.

10. On September 2, 1998, Lowry again counseled Jackson regarding excessive socializing and taking unauthorized breaks while on duty.

11. On September 9, 1998, Jackson was observed taking an unauthorized break in the College's smoking lounge, when he had not called in and requested to take a break. Based upon this, Lowry issued Jackson a verbal warning on September 10, 1998.

12. As of June 20, 2001, Jackson had received one verbal warning for tardiness and missing an assignment and one verbal warning for ineffective use of patrol time. Neither of the verbal warnings were placed in his personnel file.

13. The verbal warnings did not result in a loss of pay, benefits or status by Complainant. Jackson received a satisfactory evaluation for 1998 and received a pay raise.

14. Lowry counseled White Campus Safety Officers regarding excessive socializing.

Discussion

Paragraph 8-106.1 of the Illinois Human Rights Act, 775 ILCS 5/101-1 *et seq*., specifically provides that either party may move, with or without supporting affidavits, for a summary order in its favor. If the pleadings and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a recommended order as a matter of law, the motion must be granted. The Commission has adopted

standards used by Illinois courts in considering motions for summary judgment for motions for summary orders, and the Illinois Appellate Court has affirmed this analogy. Cano v. Village of Dolton, 250 Ill.App3d 130, 620 N.E.2d 1200, 189 Ill.Dec. 833 (1st District 1993).

In Evans and Corning Revere, 2000 ILHUM LEXIS 135 (July 31, 2000), the Illinois Human Rights Commission stated:

> The Act provides that an employer has a duty to afford all employees equal terms and conditions of employment. Among those terms is that an employer must provide a work environment free of racial harassment, ridicule and disrespect. Harassment has been defined by the Commission as any form of behavior, which makes the working environment so hostile and abusive that it constitutes a different term and condition of employment based on a discriminatory factor. Racial harassment is a per se violation of the Act.

Evans at 11-12. *(citations omitted).*

There is no direct evidence of racial harassment in the instant case, such as the use of racial slurs and epithets with reference to the Complainant, so Complainant is required to establish that he was racially harassed via indirect evidence. The method of proving a charge of discrimination through indirect means is well established. First, complainant must establish a *prima facie* showing of discrimination. If (s)he does so, respondent must articulate a legitimate, non-discriminatory reason for its actions. In order for complainant to prevail, (s)he must then prove that respondent's articulated reason is pretextual. Zaderaka v. Human Rights Commission, 131 Ill.2d 172, 545 N.E.2d 684 (1989).

In he case at bar, in order to establish his *prima facie* case, Jackson must show that (1) is a member of a protected class, (2) performed adequately, (3) incurred some adverse action, and (4) can show some nexus between his race and the adverse action. Evans and Corning Revere, 2000 ILHUM LEXIS 135 (July 31, 2000). However,

Complainant has failed to show that he incurred an adverse action. Jackson alleges that he incurred an adverse action because he was denied the opportunity to advance to other positions at Respondent *(Complainant's Memorandum of Law in Support of His Denial or Respondent's Motion for Summary Decision, at 7)*. However, Jackson fails to provide any evidence or examples of this.[2] Also, Jackson received a satisfactory evaluation and a raise at the end of the year in which the alleged incidents occurred. Based upon these facts, Jackson has failed to establish that he was subjected to an adverse action, so he has failed to establish his *prima facie* case.

Next, since there is no direct evidence of racial harassment with respect to either one of the alleged incidents, and Jackson is claiming unequal discipline, he must show that he was treated differently than similarly situated employees who are not members of the protected group in order to establish racial motivation for the alleged incidents. Motley v. Illinois Human Rights Commission, 263 Ill. App. 3d 367, 636 N.E.2d 100, 200 Ill. Dec. 909 (4th District, 1994). Here, Jackson has submitted no such evidence.

In an attempt to cast these incidents as racially motivated, Jackson's attorney states in Complainant's Response to the Motion for Summary Decision that similarly situated white officers were not subjected to the treatment to which he was subjected. However, attached to Respondent's Motion for Summary Decision are the sworn affidavits of Kevin Lowry, Supervisor in the College of Lake County Campus Safety Department and Thomas Heinrich, Director of Human Resources for the College of Lake

[2] Although Jackson does not allege that he was subjected to an adverse action because of the verbal warning he received for failing to follow proper break procedures, it should be noted that even if he had, there is no evidence that the verbal warning contained any form of discipline. In fact, Respondent provided evidence that the verbal warning was not placed in Jackson's personnel file. *(Affidavit of Thos. P. Heinrich, Respondent's Motion for Summary Decision, Exhibit J).* As such, the verbal warning does not constitute an adverse employment action. Parrot-Hamilton and Chicago Board of Education District 104, 2002 ILHUM LEXIS 14 (February 7, 2002).

County. Those affidavits detail Complainant's performance problems and College's efforts to correct them, which supports Respondent's argument that the actions of which Jackson complains were not racially motivated, but rather, were non-discriminatory efforts to monitor and correct his performance. *(Respondent's Motion for Summary Decision, Exhibits I and J).*

Complainant provides no counter affidavits or other sworn evidence. While a summary decision motion is not to take the place of a public hearing where there are disputes of genuine issues of material fact, in order to counter a well-supported summary decision motion, a complainant must do more than assert generally that disputes of material fact exist or that witnesses will refute the claims of the respondent. Evans, *supra*.

Further, although a party responding to a summary decision motion is not required to prove his or her case as if at trial in order to refute the motion, he must provide some specific factual basis to support his or her claim and may not resist the motion by merely arguing. Birck v. City of Quincy, 241 Ill. App. 3d 119, 608 N.E.2d 920, 181 Ill. Dec. 669 (4th District 1993), West v. Deere & Co., 145 Ill. 2d 177, 582 N.E.2d 685, 164 Ill. Dec. 122 (1991).

Where the non-moving party, the Complainant in the instant case, fails to file counter-affidavits which properly controvert facts presented by the moving party in affidavits, then the uncontroverted facts must be taken as true. Cano and Village of Dolton Dep't of Public Works, Ill. HRC Rep. (1988CF2367, November 27, 1991), aff'd Cano v. Village of Dolton, *supra*. Again, Complainant provides no counter affidavits or other sworn evidence. Consequently, the Lowry and Heinrich affidavits will

be taken as true. Complainant has failed to show that the incidents that he alleges in his complaint were racially motivated.

Next, Jackson has failed to show that he was subjected to a hostile working environment. Racial harassment is the result of a hostile working environment in which racially charged verbal or non-verbal behavior is directed toward a minority employee. Crider and State of Illinois, Dep't of Veterans' Affairs, Illinois Veterans Home, 25 Ill. HRC Rep. 214 (1986). A hostile work environment, for purposes of racial harassment, is an environment in which a complainant is subjected to egregious racially motivated conduct in the workplace, or an environment in which a complainant is subjected to a pattern of racially motivated incidents, such as racial slurs, in the workplace. Village of Bellwood v. Human Rights Commission, 184 Ill. App3d 339, 541 N.E.2d 1248 (1st District 1989). A complainant must establish that the behavior complained of was so pervasive that it constitutes a different term and condition of employment based upon a discriminatory factor. Evans, *supra*, Rennison and Amax Coal Co., 31 Ill.HRC Rep. 178 (1987). Such a scenario is not present here. As stated *supra*, Complainant has failed to show that he was subjected to racially motivated conduct by Respondent.

Further, two incidents do not create a hostile work environment. See, e.g. Davies and Seguin Services, Inc., 1997 WL 311409, Charge No. 1994 SF 0841, ALS No. 8977 (April 17, 1997). The Illinois Human Rights Commission has held that, for the purposes of racial harassment, a hostile work environment is an environment in which a complainant is subjected to a *pattern* of racially motivated incidents in the workplace. Davies, citing Village of Bellwood v. Human Rights Commission, 184 Ill. App3d 339, 541 N.E.2d 1248 (1st District 1989).

There is no such pattern in the case at bar. Being followed on one occasion during one's shift, and being publicly admonished regarding a smoking break hardly constitute a hostile work environment.

Finally, Respondent has demonstrated non-discriminatory reasons for its actions. College provided affidavits, which remain uncontroverted by Complainant, that establish that Complainant was admonished, verbally and in writing, regarding his excessive socializing while on patrol, and his failure to adhere to guidelines regarding breaks and effective use of patrol time. These uncontroverted affidavits sufficiently establish that the actions of which Jackson complains, were taken because of his legitimate performace issues, not because of his race.

Conclusions of Law

1. The Human Rights Commission has jurisdiction over both the parties and the subject matter in this cause.

2. Complainant is an "aggrieved party" as defined by Section 1-103(B) of the Act and an "employee" as defined by Section 2-101(A)(1)(a).

3. Respondent was an "employer" as that term is defined in the Act. 775 ILCS 5/2-101(B)(1)(a).

4. Complainant failed to present direct evidence of harassment based upon his race, African American.

5. Where a party fails to file counter-affidavits which properly controvert facts presented by the opposing party, the uncontroverted facts are to be taken as true, notwithstanding the existence of contrary unsupported allegations in the adverse party's pleadings.

6. Complainant has not established a *prima facie* case of different terms and conditions of employment or verbal harassment based on his race, African American.

7. Based on the record in this matter, there are no genuine issues of material fact for decision.

8. Respondent is entitled to summary decision in its favor as a matter of law.

Recommended Order

For the foregoing reasons, I recommend that Respondent's Motion for Summary Decision be GRANTED, and the complaint be DISMISSED in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

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BY:
WILLIAM H. HALL
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: July 2, 2002